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No.------

In the Supreme Court of the United States

OCTOBER TERM, 1945

CORNUCOPIA GOLD MINES,
A Private Corporation,
Petitioner and Appellant,

vs.

CARL LOCKEN, Administrator of the
Estate of Anna Locken, Deceased,
Respondent and Appellee.

Brief of Respondent and Appellee

In Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

We do not deem it necessary to review seriatum the contentions made by the petitioner in its petition here, nor to renew here the arguments and citations of authorities made in the Circuit Court of Appeals. These questions are run together in such form that it is difficult to segregate them, and before the Court could clearly understand them it would be necessary to read the entire evidence.

As we understand the rules of this Court, the Court will not go into the evidence upon this petition. We emphatically deny that either the Honorable James A. Fee, District Judge of long standing who tried this case without a jury, or the Circuit Court of Appeals for the Ninth District failed to apply any rule of law of Oregon either statute or as announced by the decisions of its courts that had any application to the facts involved. A clear statement of the facts concerned in this case and the findings made by the lower court which were concurred in by the Circuit Court of Appeals clearly shows that it was correctly held by the Circuit Court of Appeals that the law of Oregon involved in this case is in harmony with the general rule as stated in Restatement of the Law, 2 Torts, Section 355, pages 908-911, and in Clark v. Longview Public Service Co., 143 Wash. 319, 255 Pac. 380, and cases there cited.

We submit that no authority submitted by appellant is in point on the facts involved in this case.

Summing the entire contentions of appellants in this case, the question is boiled down to merely one issue: Was it necessary for the determination of the case for the Court to try out the title to the land on the exact spot where Anna Locken met her death? The title was not at is-

sue in the pleadings and the court held correctly and made its findings to the effect that Anna Locken was not a trespasser on the land of the defendant when she met her death. This was supported by the overwhelming weight of evidence, as well as the law not only in Oregon but generally.

STATEMENT OF CASE—APPELLEE

Owing to the fact that appellee controverts many statements made by the appellant in its statement of the case, and by virtue of arguments and mis-statements contained therein, appellee does not feel that the Court will have a true picture of the facts involved in this case before this Court on petition for writ of certiorari without an additional statement of the case and the facts involved as shown by the record. The important facts are substantially as follows:

This case was originally filed by Appellee in an Oregon State Court and on account of diversity of citizenship was removed by appellant to the Federal District Court. The case was tried by the Honorable James A. Fee, District Judge for Oregon, sitting without a jury. It is an action to recover by an administrator on behalf of himself as widower and the minor children of the deceased for the death of Anna Locken, as a result of her coming into contact with a live electric wire carrying 2300 volts, fallen from a transmission line

owned, operated and maintained by appellant, between Cornucopia, Oregon, and its' Union mine located westerly therefrom approximately 1½ miles through unfenced forest and mining territory. (T. 14-15, 41, 85.)

The town of Cornucopia is an old established incorporated town located on Pine Creek on the south slope of the Wallowa Mountains in Baker County, in Northeastern Oregon. The farming town of Halfway is located approximately 12 miles further down the valley. During the times that the mines in this district are operating the town of Cornucopia has a population of several hundred people; during the times that the mines are shut down the population dwindles.

The appellant has a mine at Cornucopia and operates a generating plant located at Cornucopia that supplies electric current not only for its mining operations but also for the town. A transmission line of the appellant corporation runs from the town to its' Union mine. About one-fourth mile from the town this transmission line crosses a canyon known as the Red Jacket Canyon. The transmission line is suspended across this canyon for a distance of approximately 504 feet from poles from each side of the canyon. (T. 15, 161-162).

On the 20th day of May, 1942, and for several months prior thereto, the mines of the appellant

corporation were shut down and its' only employees at Cornucopia and its mines were watchmen, none of whom were licensed or experienced as electricians. (T. 40-41, 85-86, 232-238). Its' generating plant, however, was operating and its' transmission lines carried current for the town and for heat to keep the motors dry. The current between these two mines was continuously left on after the closing of the mines, namely, November 1, 1941, up until the date of the death of Anna Locken.

The most southerly wire of appellant's transmission line had come loose from its' splice near the support on the west side of the canyon and had fallen in brush in and across this canyon but was still energized. (T. 15, 43-44, 55, Ex. C.)

On the 20th day of May, the appellee's decedent, Anna Locken, and her mother, Mary Myers, left the residence of Mary Myers at Cornucopia and started out for a walk and to look for mushrooms. (T. 77).

A road leading in the direction of and to appellant's Union mines runs out of the town of Cornucopia to the west and crosses the mouth of Red Jacket Canyon approximately 200 feet below the place where appellant's transmission line is suspended across the canyon. (T. 16) This is not a private road of the appellant and the land over which this road crosses from the town of Cornuco-

pia to the Red Jacket Canyon is on land not owned by the appellant and it is not claimed by the appellant that they have any right of way thereon and said road is used by other miners operating their claims in this mining district between the appellant's Cornucopia mine and its' Union mine. (T. 194 and 195, 197-198) Mr. Dunn, appellant's witness testified:

"Q. Is the road on Cornucopia property?

A. Not all the way.

Q. Well, up to where this accident occurred, where is it?

A. The road doesn't hit Cornucopia property until about where the accident occurred, until it hits the Coup D' Or claim." (T. 197-198)

"Q. Now, there are other claims, miner's claims, up past the Cornucopia mine, aren't there?

A. Yes, sir.

Q. They use that road, don't they, going back and forth to their mines?

A. Certainly." (T. 194)

That said road and said Red Jacket Canyon and vicinity and the place where Anna Locken was killed was freely travelled and used by the citizens of Cornucopia and the public generally and included mushroom and berry hunters. (T. 52, 84, 155)

The land in Red Jacket Canyon, as well as all other lands between Cornucopia and the Union mine is unfenced land and is mostly public domain

or national forest. (T. 49, 15, 92) Near the mouth of the canyon where the road crosses said canyon some of the land has been located as mining claims. Two claims belonging to one Richard Perry and associates are located at the mouth of the canyon. One of said claims extends north up the canyon across the road herein mentioned beyond the point where the decedent, Anna Locken, was electrocuted, and also extends westerly for a distance of approximately 6.88 feet to 10 feet from where she was so electrocuted. Anna Locken was electrocuted on this property. (T. 141-142, 152-154 incl.) These claims had been worked at two different places and a path or trail connects the two workings. (T. 157) These claims are sometimes known as the Very Fair and Very Hard respectively. (T. 159) West of the Perry claim known as the Very Fair the appellant corporation has a patented claim known as the Coup D' Or. There is nothing to mark or indicate the line between the Perry claim and that of the appellant corporation. None of this land in the Red Jacket Canyon under its' transmission line had been in possession of or operated by the appellants but said land at the mouth of said canyon and up and beyond said transmission line for many years had been possessed by Perry and others under their claim rights. Their possession and claim of ownership was open, visible, notorious and undisputed.

(T. 153-154)

As Anna Locken and her mother reached Red Jacket Canyon along said road, Mrs. Myers stopped to take some rocks from and repair a ditch carrying water from said canyon across said road into what is known as Elk Creek which flows into Pine Creek. Anna Locken continued up said road for a short distance and turned off on or near the trail used by Perry and associates upwardly along said canyon for a distance of approximately 200 feet where she was electrocuted by said wire lying across said trail near the ground and concealed in brush of similar size and color. (T. 78-9, 43, 158) There was no trespass signs and no warning signs of any kind or nature on any of this land at or near the Red Jacket Canyon, or between the town of Cornucopia and said Red Jacket Canyon, excepting there was a sign stretched high across this public road that led to Red Jacket Canyon at a point where it intersects a street of Cornucopia warning of trucks that were using this road. No trucks had been on the road for many months, which was well known to Mary Myers when she and her daughter entered that road. (T. 43, 80, 68, 70) The canyon from the place where it reaches Elk Creek up to and beyond the transmission line for some distance is, as hereinbefore stated, comparatively level and is covered principally with brush and grass. (T. 157-8)

Appellant on page 4 of its Petition states: There had been no previous break in the wire up to the time of the accident, and cites (T. 231). The testimony is as follows:

"Q. Is this the only trouble you have had with the wire ever **breaking right there,** is that right?

A. That is the only trouble **I had had."** Italics are ours)

There was no testimony that the line had not broken elsewhere. Elmer Benham, the only electrician who testified in this case, in this respect testified substantially as follows: That the three wires between the poles next adjoining this tower on the west from where this fallen wire came loose each contained two splices. (T. 125) That this wire was of the same size as that which crossed the canyon. (T. 125) He further testified as an expert from the appearance of plaintiff's Exhibit C which is a picture of this transmission line wire where the same became disconnected by breaking as claimed by appellant or by pulling loose from a defective splice as claimed by appellee substantially as follows: That they had tried to make a messenger splice, which he indicates had not been made and that the wire had slipped from this splice; that the connection should have been made with a sleeve with a wire of that size and on which that much strain would be across the canyon. He described

such a sleeve as one with "ferra" connections and that if a sleeve was not used that the wire should have been welded instead of spliced. (T. 106-7, 117, 124) Mr. Benham had inspected this line from the defendant's generating plant in Cornucopia to the Union mine and the line where it is accessible from the road. (T. 101, 110) He testified in his opinion that the wire was too light that spanned this canyon, that they should have put in more poles down in the canyon or have supported the wires across the canyon with a heavy messenger, and described the messenger as being an extra cable that carries no energy, properly insulated from the poles, to support the weight of the wire in the center by insulated material. (T. 108) That on that hard drawn **wire** and the poles that were there, if they were spanning 300 feet it would be plenty on account of the wind storms they have there. (T. 114)

He further testified that the brush in the canyon where the body lay contained many burns; that by laying in the brush and not on the ground an arc is caused that goes directly into the ground but not enough to fill up the breakers down at the plant. (T. 100-101, 123) This latter testimony clearly indicated defective construction and maintenance and the fact that the wire was down a considerable length of time prior to the death of Anna Locken. Mary Myers' testimony as to radio

interference prior to the death of her daughter is also circumstantial evidence to the same effect.

On page 6, appellant's Petition, complaint is made that the Court did not find what, if any, legal duty was owned by the defendant to the decedent. This is not correct. The Court in its findings found that the plaintiff had established his case against defendant and the Court concluded from these facts:

"That the defendant corporation owed to Anna Locken the duty of due care, and her death was the proximate result of defendant's carelessness, negligence, and recklessness, and its failure to exercise due care for the safety of Anna Locken." (T. 32, Conclusion II)

Appellant further complains on page 6 of its' Petition, that the Court failed to pass upon the question as to who owned the property at the place where the accident occurred and which party had the burden of proving ownership of this property. The Court did not deem it necessary as shown by his remarks, to try out the fine niceties of title at the exact spot where the body was lying but did find:

"That on said 20th day of May, 1942, Anna Locken was lawfully walking in said canyon at or near the boundary line of a mining claim owned by said corporation and a claim owned by third parties, and came in contact with said charged electric wire of said defendant's power line that had been allowed to fall and remain down in said canyon." (T. 27, No. IX)

"That a general travelled road crosses the canyon near the point of said power line crossing; that a portion of the land in said canyon has been located as mining claims by various persons, including some owned by defendant corporation, but the boundaries of said claims are unmarked and could only be discovered by means of a careful and proper survey, and the land in said canyon and at and near the place where Anna Locken met her death, had for many years prior thereto, been crossed and travelled by the public generally without objection from anyone, and no danger or warning signs whatsoever, at or prior to the time of the death of Anna Locken, were placed at or near any of said properties in said canyon." (T. 26-27, No. VIII)

The Court further found:

"And the nature of the ground in said canyon at and near the place where said wire was lying near said ground in said brush, said fallen wire virtually constituted a trap for anyone walking or travelling in said canyon, and was a condition that any reasonable person operating and maintaining a charged power line would know was liable to cause the death or injury of anyone coming into said canyon, regardless of what land they were on." (T. 28-29)

But the crux of the Court's findings on this point is as follows:

"That there was no proof that Anna Locken was a trespasser upon the land of defendant at the time of her death." (T. 28, No. IX)

The title of the lands at the exact spot of decedent's death was not an issue in the pleadings but the appellant did claim that Anna Locken was a trespasser. The Court clearly found that the de-

cedent, Anna Locken, used due care for her own safety and that she was not a trespasser.

It appeared to us that the appellant had taken the position at and during the time of trial that no matter whose land Anna Locken was upon, she was a trespasser. The Court clearly found and concluded, we think, by the undisputed authority of this state and generally, that if Anna Locken was not upon property owned by the appellant, under no circumstances could she be regarded as a trespasser. It was immaterial whether she was on land of Perry and associates or United States Government or other third parties.

The Court further found:

"That the said Anna Locken was not a trespasser in entering into and upon said lands at the place where she met her death in coming in contact with said charged electric wire." (T. 31, No. XIII)

The misstatement is made on page 6 in effect that when the Court found that under the Oregon law plaintiff had the burden of proving the ownership of the land where the death occurred it changed its view that whoever had the burden of proving ownership would lose and got around it by saying that the accdent happened close to the property line. As shown by the quoted statement of the Court on page 6 of this petition the court said in effect that whoever had the burden of proving lost out on that particular point and then found

that this question was raised under the appellant's affirmative defense and that the burden was on the appellant and it had failed to carry that burden and establish its defense. The District Court correctly held that the defense had the burden of proving its affirmative defense of "contributory negligence by trespass in the face of numerous warning signs of danger", and that the appellant had failed to establish this defense. That appellant had the burden in this defense we believe is borne out under the statutes and decided cases of Oregon.
(Ante, page_____)

The lower court found that plaintiff had established all the material allegations of his amended complaint and as agreed in the pre-trial order and these findings were supported by the overwhelming weight of the evidence. The Circuit Court of Appeals held that these findings were in accordance with the evidence and the law and that it was not necessary for the Court to try the title to the land at the exact spot where the accident occurred. As pointed out in this Brief the overwhelming weight of evidence was to the effect that Anna Locken was killed on property not belonging to the defendant corporation and as the lower court had stated that if pressed to make a finding on this issue he would find this issue against the appellant. Appellant did not urge this finding so invited the

error, if any, of which it now complains.

Counsel further, on page 7, states that respondent's counsel by objection prevented further survey from being made.

The appellee produced as a witness in the case a competent and licensed civil engineer and surveyor, the then official county engineer and surveyor of Baker County, wherein this property lies, a man fully familiar with this territory who had made a careful survey of this land from a well-established quarter section corner and known to him to be a correct quarter corner and testified positively that this land where Anna Locken was killed was not on the appellant's land (Coup D' Or claim) as contended by appellant at the trial. (T. 141-144 incl., 146-150 incl. Also Ex. 14 A and B and Z.)

He further testified that the government maps introduced in evidence from its data definitely showed that this land where the body lay was not on land owned by appellant. (T. same as above) He was the only licensed surveyor and engineer who testified. The only testimony offered by appellant on this matter, was that of a high school graduate who had done some work principally for the appellant corporation under a duly licensed engineer. This witness was not with an engineer or surveyor when he made this survey. (T. 187, Court's remarks T. 200) He never surveyed from

any established corner or quarter corner, but only from witness trees on this one claim. He never found any actual corner even at that claim. (T.189)

We also introduced the evidence of a man who claimed that he and his associates had been mining this property under claim of ownership and right of possession for more than ten years last past adverse to the appellant and to the world; that the portal of their mine ran directly under the road that crosses this canyon; that they worked the claim below and above where Anna Locken was injured and that at and near the spot where she was electrocuted they had demanded and caused the appellant corporation to repair damage it had caused to this property, doing work not in connection with mining operations at this point. (T. 153)

We felt that we had definitely proved beyond all reasonable doubt that Anna Locken was not electrocuted on property of the corporation by the only competent evidence introduced at the trial. From remarks of appellee's counsel and remarks of the Court (T. 256-257) it is clearly shown that appellee urged a clear-cut finding on whose property Anna Locken was killed and from remarks of Mr. Kilgenny and the Court (T. 258) that appellant did not insist upon such a finding. If there was any fault or deficiency in this respect it was clearly against appellee's desires and on the reluctance of

the appellant to urge such finding.

The Court however took the theory that if he was going to decide this question of title and that if he were pressed to make such a decision by the appellant that he would decide against the appellant as shown by his remark as follows:

"The Court: If the defendant insists that I find on this question, I will find for the defendant.

Mr. Kilkenny: No. I am not going to insist. I do not know what Mr. Powers will do.

The Court: I think there is some evidence from which I might find against the defendant, but I did not feel like I should do that—I had not made up my mind on the question. I stated that at the time, that I thought that would be the result, and I stated where the burden of proof lay, and I figured the burden of proof lay upon the plaintiff, and the burden had been carried by the plaintiff, and if the defendant felt it was on its property, then contributory negligence might be established in that event, and the defendant in that regard had the affirmative burden of proof." (T. 258)

By the first statement of the Court before Mr. Kilkenny, representing Mr. Powers, stated that he was not going to insist clearly indicates the Court would make such a finding for the appellant, but he also clearly indicates that that finding would be against the appellant and that is the reason that

Mr. Kilkenny did not insist.

The Court also in his remarks states:

"But, in any event, it was within a few feet of the property line, and in such a situation that the defendant is bound to use just as much care as if the line had fallen on property owned by another or upon the public highway, in view of all the circumstances." (252)

It appeared to the writers of this brief that the Court would not make this finding for the reason that Mr. Nelson, county engineer and surveyor of Baker County, had made his survey from a well-established quarter section corner rather than a section corner. Mr. Nelson, however, testified that that survey was as positive as if he had surveyed from a section corner. (T. 144, 146-147)

The undisputed testimony, we believe, shows that the greater portion of Red Jacket Canyon, where the transmission line spans the same, and where the energized wire was down, was not on appellant's property. Its' Coup D' Or claim, the only property owned by appellant that they claim was under the transmission line, was on the westerly side of the canyon and as stated by the Court, the place where appellant was electrocuted was close to the line of its' property.

Respondent's Answer to Appellants Specifications of Error.

Appellant's principal contention in its speci-

fications of error and the only one which we feel this Court could feel is worthy of any consideration, is that the District Court and the Circuit Court of Appeals failed to apply the law of Oregon to the facts in this case. It is our position that this contention is not true. We submit that it is the law of Oregon:

1. A plaintiff is only required to establish the material allegations of his complaint by a preponderance of the evidence.

Minter v. Minter, 80 Or. 369, 157 Pac. 157;
Botting v. Polsky, 101 Or. 530, 201 Pac. 188;
Gray v. Hammond Lumber Co., et al, 113 Or. 570; 232 Pac. 637; 233 Pac. 561; 234 Pac. 261.

2. A defendant pleading an affirmative defense has the burden of establishing such defense by a preponderance of the evidence.

Oregon Compiled Laws Annotated, Vol. 1, p. 254, Sec. 2-301;
Consor v. Andrew, 61 Or. 483, 123 Pac. 46;
Sorenson v. Kribs, 82 Or. 130, 161 Pac. 405;
West v. Kern, 88 Or. 247, 171 Pac. 413,
Saylor v. Enterprise Electric Co., 110 Or. 231, 222 Pac. 304, 223 Pac. 725;
Ordeman v. Watkins, 114 Or. 581, 236 Pac. 483.

3. Entry upon unfenced forest lands where stock and pedestrians habitually go and come, is a mere technical trespass of no avail as a defense where death is caused by instrumentality known to

be likely to cause death or great bodily harm.

Campbell v. Bredewell, 5 Or. 311;
Moses v. S. P. R. R. Co., 18 Or. 385;
Wilmot v. Oregon Railroad Co., 48 Or. 494, 87 Pac. 528;
Crepe and Harris v. Davis, et al, 107 Or. 142, 214, Pac. 343;
Hill vs. Tualatin Academy, 61 Or. 190, 121 Pac. 901;

4. Those engaged in the transmission of such a dangerous commodity as electricity must exercise the utmost care to avoid injury to others.

Saylor v. Enterprise Electric Co., 110 Or. 231, 222 Pac. 304;
Sanders v. California-Oregon Power Co., 133 Or. 571, 291 Pac. 365;
Sullivan v. Mountain States Power Co., 139 Or. 282, 9 Pac. (2nd), 1038.

5. One who enters upon the premises of another by invitation expressed or implied, is not a trespasser or a bare licensee, and the owner of the premises owes him the duty of due care.

Cederson v. Oregon Navigation Company, 38 Or. 343, 62 Pac. 637;
Hise v. City of North Bend, 138 Or. 150, 6 Pac. (2nd) 30.

6. Whether or not Anna Locken was a trespasser on land owned by others than appellant in no case is available as a defense by appellant.

Turnidge v. Thompson, 89 Or. 637, 175 Pac. 281;
Cooper v. North Coast Power Co., et al, 117 Or. 652, 244 Pac. 665; 245 Pac. 317;

Appellant bases its contention that the District Court and the Circuit Court of Appeals failed to apply the Oregon law in this case on the assumption that plaintiffs decedent was a bare licensee and that under the Oregon law, a licensee can never recover except for wanton negligence or intentional wrong. It cites as its authority for this, three Oregon cases, in none of which are the facts in any manner even similar to the situation found in the case here.

The case of Lang v. St. Johns Lumber Company, 115 Or. 337, was a case where the plaintiff was injured falling down a lumber shoot in a dock which she was crossing after night to visit the captain of a ship.

The case of Kesterson, et al, v. California-Oregon Power Company, 114 Or. 22, which the Circuit Court of Appeals in its opinion pointed out was not in point in this case, was an action for damages for the burning of lumber piled under defendant's power line and upon its right-of-way.

The case of Napier v. First Congregational Church, 157 Or. 110, was an action for damages for injuries resulting from falling down a stairway while looking for a lavatory. In the latter case, the Oregon Supreme Court distinguished it from the case of Hill v. Tualatin Academy, 61 Or. 190, saying that in the Napier case, no dangerous in-

strumentality was involved.

We firmly believe that the preponderance of the evidence in this case shows that Anna Locken was not upon defendant's land at the time she met her death, but appellant's assumption that the law laid down in the authorities it cites applies to all cases in which a licensee is involved, is entirely without foundation. In our case, the evidence showed and the Court found that the land in the canyon at and near the place where Anna Locken met her death had, for many years prior thereto, been crossed and travelled by the public generally without objection from anyone, and in the case of Cederson v. Oregon Navigation Company, 38 Or. 343, which was a case where plaintiff's decedent was killed upon the defendant's right-of-way by a car jumping the track, the Oregon Supreme Court, in sustaining a verdict for the plaintiff, among other things, said:

> "The wagon road at that point was in frequent and constant use by Seufert Bros. Company's employees, both on foot and with teams, especially during the fishing season, and more or less by the general public. This state of affairs continued for a long time, which taken in connection with the manner in which the wagon road was constructed and its proximity to the side-track tends, in some measure at least, to show that defendant was cognizant of the conditions, and that they so existed with something more than its tacit consent, or, rather, that they existed with its approval. **If the**

decedent was a licensee by invitation or inducement, then it was incumbent upon the defendant to exercise active vigilance in respect to him. It was forewarned, and should have been forearmed.

In the case of Hise v. City of North Bend, et al, 138 Or. 150, which was a case involving the driving of an automobile off the end of a municipal dock, the defendant City, in its Answer, after denying all the charges of negligence, set up the affirmative defense that "the plaintiff was a trespasser or a bare licensee upon the wharf, and his injury was not due to any willful or wanton conduct on the part of the City" The Oregon Supreme Court, in sustaining a verdict for the plaintiff, said:

> "The city next argues that the circuit court erred when it refused to instruct the jury as follows: 'If you find that the plaintiff drove out and upon the wharf of the defendant, the City of North Bend, and therefrom into the waters of Coos Bay and that at the time he did so, he was upon said wharf without the invitation, express or implied, of the defendant city of North Bend, nor with its consent, nor on any business connected with said wharf, he was at that time a bare licensee.' As will be observed from the evidence previously reviewed, Virginia Street led directly to this wharf and the latter was only 775 feet from the center of the city. No obstructions or gates prevented free access to the wharf. No signs forbade the public from entering any part of it. Although the members of the city council knew that the wharf was being daily used by the public, no effort was made to obstruct access to it."

At page 62, the Court said:

> "It seems to us that the above conduct upon the part of the city could readily warrant a finding that an invitaton, at least an implied one, had been extended to the general public, including the plaintiff, to enter upon the wharf: Bennett v. City of Portland, 124 Or. 691 (265 p. 433); 45 C. J., Negligence, p. 808, Par. 218. See also, Gray v. King County, 140 Wash. 169 (248 p. 397.)"

> "Since we have concluded that the evidence was capable of sustaining a finding that the plaintiff had been invited upon the wharf, it necessarily follows that it was the duty of the city to exercise reasonable care for his safety."

These cases show clearly that under the law of Oregon, the defendant could be liable for the wrongful death of Anna Locken, even if she was on its land and, as a result, it was not necessary for the Court to determine who held the legal title to the land at the exact spot where she was killed, as long as it found that she was not a trespasser or guilty of contributory negligence, and that under the circumstances as shown by the evidence in the case, the defendant owed her the duty of due or reasonable care. These are exactly the things that the Court did find, and its decision was in accordance with the law laid down by the decided cases of the Supreme Court of Oregon.

There is apparently no Oregon case deciding the law on a state of facts exactly the same as we have here, but the cases we have cited, we feel, are

amply sufficient to show that if the facts in this case were before the Oregon Supreme Court, it could, under its previous decisions and, we believe without question, would decide exactly as the District Court of the United States for the District of Oregon and the Circuit Court of Appeals for the Ninth District has decided this case.

Appellant's specification of error that the Court failed to comply with the requirements of Rule 52 (a), we believe, is not worthy of any consideration.

The Court's findings (T. pps. 23 to 33) contain 14 separate findings of fact and 3 conclusions of law. They fully cover every issue in the case and show the ground upon which the Court's decision was based.

In finding 8 (T. 26), the Court found:

> "The land in said Canyon at and near the place where Anna Locken met her death had, for many years prior thereto, been crossed and travelled by the public generally without objection from anyone, and no danger or warning signs whatsoever, at or prior to the time of the death of Anna Locken, were placed at or near any of said properties in said Canyon."

In finding 9 (T. 28), the Court found:

> "That the defendant corporation knew, or should have known, that other persons owned land in said canyon under its power line, and that other people were accusomed to, had a right to, and did walk and travel in and through said canyon and under said line where it cross-

ed said canyon at and near the place where the said Anna Locken was walking at the time she came in contact with said wire; * * * "

In finding 9 (T. 27), the Court found:

"That on the 20th day of May, 1942, Anna Locken was lawfully walking in said canyon at or near the boundary line of a claim owned by said corporation and a claim owned by third parties, * * * "

That in finding 13 (T. 31), the Court found:

"That the said Anna Locken was not a trespasser in entering into and upon the said lands at the place where she met her death * * * "

In finding 12 (T. 31), the Court found:

"That the decedent, Anna Locken, was not guilty of any contributory negligence in bringing herself in contact with said wire * * * "

In conclusions No. 2 (T. 32), the Court found:

"That the defendant corporation owed to Anna Locken the duty of due care, and her death was the proximate result of defendant's carelessness, negligence and recklessness, and its failure to exercise due care for the safety of Anna Locken."

It is our contention that these portions of the findings alone are sufficient to clearly show the basis of the Court's decision, and to comply with the requirements of the rule cited.

"Findings in which a Federal District Court and a Circuit Court of Appeals have concurred will be accepted by the Supreme Court where they are not shown to be plainly erroneous or unsupported by evidence."

Pick Manufacturing Company v. General Motors Corporation, 299 U. S. 3;
Virginia Railroad Company v. System Federation, 300 U. S. 515;

Defendant's last Assignment of Error is a claim that there is insufficient evidence to support the Court's conclusions, and particularly the conclusion that defendant would be liable, even if deceased was a technical or other kind of trespasser, and that defendant was guilty of wanton negligence. The Court made no such conclusions as appellant is complaining of. The Court's conclusion was that defendant failed to exercise due care for the safety of Anna Locken. This, under the law of Oregon, is ordinary negligence.

"In view of these circumstances, the degree of care imposed was commensurate with the danger. 'Due care is a degree of care corresponding to the danger involved': Cooley, Torts. It is not the same in all cases. The term is relative, and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose."

Ahern v. Oregon Telephone Co., 24 Or. 276, 33 Pac. 403;

Nothing was said by the Court in its conclusions about deceased being a technical or other kind of trespasser. It may be that what appellant meant by conclusions of law, was findings of fact, but even if this is true, what we have already said is also true.

In finding No. 9 (T. 29), the Court said that defendant's negligence amounted almost, if not to, wantonness, but it did not base its verdict upon this statement, and in finding No. 10 (T. 29), the Court found that Anna Locken met her death through the carelessness, negligence and recklessness of the defendant. All of these findings were amply supported by the evidence. The only reference that we know of to the effect of Anna Locken's being a technical or other kind of trespasser is a statement contained in the Opinion of the Circuit Court of Appeals. This statement was, in no manner, the basis of the decision and verdict of the Court and, as we read the rules of this Court and its decided cases, none of the matters above referred to would be any grounds for granting the appellant's Petition.

Appellant, in its Petition and Brief in support thereof, seems to take the position that this is a very important case. In reality, it is a simple action for wrongful death under the law of negligence, and the verdict was only for the sum of $7,500.00. This case was brought in the Circuit Court of the State of Oregon for Union County in September, 1942. If it had been tried there it would have been settled years ago. The appellant filed a Motion for its removal to the District Court of the United States, where it was put at issue and

tried after considerable delay. Appellant then appealed to the Circuit Court of Appeals for the Ninth District, where the case was briefed, argued and affirmed. They are now attempting to have the matter heard before the Supreme Court of the United States. It has been over three years since this case was started. We feel that the conduct of the appellant in dragging this case through the Courts for this length of time has unduly delayed the proceedings upon the Judgment of the lower Court, and has been done merely for delay, and that appellant's Petition should be denied and the respondent allowed damages in accordance with Rule 30 of the rules of this Court.

We respectfully submit that the appellant's Petition should be denied, and costs and damages awarded the respondent.

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